

Circuit Court for Baltimore City
Case No. 24-C-21-002681

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 983

September Term, 2021

BALTIMORE WASHINGTON RAPID RAIL,
LLC

v.

WESTPORT CAPITAL DEVELOPMENT,
LLC, ET AL.

Berger,
Arthur,
Reed,

JJ.

Opinion by Berger, J.

Filed: March 4, 2022

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

This appeal arises from a decision of the Circuit Court for Baltimore City dismissing the condemnation action filed by Baltimore Washington Rapid Rail, LLC (“BWRR”), appellant, against Westport Capital Development, LLC and Stonewall Capital, LLC, appellees. Westport Capital Development, LLC, is an affiliate of Stonewall.¹ BWRR filed its First Amended Complaint for Condemnation and Demand for Jury Trial (the operative complaint at issue in this appeal) in the circuit court seeking to acquire title to certain parcels of property in the Westport area of Baltimore City in connection with its proposed super-conducting magnetic levitation train (“SCMAGLEV”), which BWRR seeks to construct between Washington, D.C. and Baltimore City. Stonewall moved to dismiss BWRR’s complaint, arguing that the condemnation action was not authorized.² The circuit court granted Stonewall’s motion to dismiss, and BWRR appealed.

On appeal, BWRR presents four issues for our review, which we set forth verbatim as presented in BWRR’s brief:

¹ We shall refer to the appellees collectively as “Stonewall.”

² BWRR filed its original complaint on June 8, 2021. Stonewall filed a motion to dismiss on July 1, 2021. In response, BWRR filed the amended complaint that is at issue in this appeal. BWRR alleges that at the time the initial complaint in this litigation was filed, the parcels of property BWRR seeks to condemn were under contract to be sold by Westport Property Investments, LLC, to Westport Capital Development, LLC, which is an affiliate of Stonewall. BWRR attempted to purchase the property from Westport Property Investments before the sale to Westport Capital was finalized but was unsuccessful in doing so. BWRR asserts that the sale of the property to Westport Capital was subsequently finalized on or about June 18, 2021, with Westport Capital paying approximately \$13,000,000 for the property. Westport Capital plans to develop the waterfront property “into a South Baltimore waterfront destination, featuring multifamily residential, retail, offices, restaurants, and waterfront park space.”

1. Did the Circuit Court err in dismissing BWRR's condemnation action under Section 5-407(d) of the Public Utilities Article of the Maryland Code for failing to obtain the consent required by the Statute when (a) the Amended Complaint alleged that such consent was sought and obtained, (b) it is a matter of public record that the Mayor and City Council of Baltimore expressly consented to transfer the authority to exercise the railroad franchise and specifically referenced Section 5-407 in granting its consent, and (c) BWRR was not seeking to condemn, use, or occupy any road, street, alley, highway, or other public way or ground in Baltimore City?
2. Was dismissal of BWRR's condemnation action erroneous when the Circuit Court never addressed or disregarded the Final Order of the [Public Service Commission] which noted expressly that the transfer of the right to exercise the franchise also conveyed the right of eminent domain, subject to the limits of Maryland Public Utilities Article §§ 5-407 and 9-303(d)?
3. Was dismissal of BWRR's condemnation action improper based on the assertion that "it's arguable that a mag lev's not a railroad?"
4. Was dismissal of BWRR's condemnation action improper based on the assertion that it is an "instrumentality" of the State under Section 12-105.1 of the Real Property Article, even though BWRR pled in its First Amended Complaint that it was a private company and not an instrumentality of the State and the Circuit Court never addressed this issue in its ruling?

For the reasons explained herein, we shall reverse the judgment of the circuit court and remand this case for further proceedings in the circuit court.

FACTS AND PROCEEDINGS

We set forth the facts and proceedings in the light most favorable to BWRR, the non-moving party below. The SCMAGLEV is a project proposed by BWRR that has been

in the planning stages for approximately ten years. The proposed SCMAGLEV would travel at speeds up to and above 311 miles per hour, meaning that a trip from Washington, D.C. to Baltimore City would take only fifteen minutes. The SCMAGLEV would operate between Washington, D.C. and Baltimore City with an intermediate stop at Baltimore/Washington International Thurgood Marshall Airport.

BWRR asserts that the SCMAGLEV will confer numerous economic, social, and environmental benefits to the State of Maryland and the City of Baltimore. The portion of the SCMAGLEV that would run through Maryland is largely underground and would run in a concrete guideway. BWRR intends to use undeveloped land in the Westport area of Baltimore City for the SCMAGLEV project. Specifically, the property BWRR seeks to use for the project is located across the following Baltimore City addresses, all in zip code 21230: 2001 Kloman Street, 2033 Kloman Street, 2099 Kloman Street, 2101 Kloman Street, 2201 Kloman Street, 2401 Kloman Street, and 2841 Waterview Avenue (collectively, the “Property”). The Property is currently owned by Westport Capital Development, LLC, an affiliate of Stonewall.

On September 3, 2014, BWRR submitted an application to the Maryland Public Service Commission (the “Commission”) requesting that the Commission transfer to BWRR the legislatively created railroad franchise that had been abandoned by the Washington, Baltimore, and Annapolis Electric Railroad Company (“WBA”). The WBA franchise was granted by the Maryland General Assembly to the now-defunct WBA and included the right to construct and operate a rail line from the eastern boundary of Maryland

and the District of Columbia to Baltimore City. The Commission authorized the abandonment of the franchise by WBA in 1935 primarily to increase the value of the other assets to be sold during a foreclosure sale.

On September 23, 2014, the Commission issued a Notice seeking comments on BWRR's application for transfer and inviting alternative applications seeking transfer of the WBA franchise to be filed. The Commission received "a multitude of comments supporting the transfer" and no alternative applications. The Commission received written testimony from BWRR representatives as well as from the Commission's technical staff, and, on July 9, 2015, held an evidentiary hearing for cross-examination of BWRR's witnesses and Commission Staff's witnesses. The Commission found that the transfer of the franchise was "in the public convenience and necessity" and issued a decision in Order No. 87248 authorizing the transfer of the WBA franchise to BWRR. No appeal was taken from the Commission's order, and it became final on November 15, 2015.

After the Commission issued its decision, BWRR sought Baltimore City's consent to the transfer of the franchise. On March 17, 2017, Baltimore City adopted a resolution addressing the transfer, which provided in relevant part:

SECTION 1. BE IT RESOLVED BY THE MAYOR AND CITY COUNCIL OF BALTIMORE, That the Mayor and City Council of Baltimore acknowledge that BWRR has sought its consent to the transfer of the authority to exercise the franchise formerly held by the Washington, Baltimore and Annapolis Railroad in accordance with PSC Order No. 87248, in Case 9363, and the Mayor and City Council of Baltimore hereby grant that consent, subject to Section 2 of this ordinance regarding the necessity of a franchise ordinance to construct and operate the SCMAGLEV on City Public ways.

SECTION 2. AND BE IT FURTHER RESOLVED, That Section 1 of this Mayor and City Council resolution does not constitute consent or authorization for BWRR to occupy any road, street, alley, or other public way in Baltimore City, and in the event BWRR intends to occupy any road, street, alley, or other public way in Baltimore City, additional prior consent in accordance with Article 8 of the Baltimore City Charter must be obtained from the Mayor and City Council of Baltimore.

(Emphasis in original.)

BWRR “engaged in repeated discussions” in attempts to purchase the Property from Westport Investments, the entity that owned the Property until June 18, 2021. BWRR also attempted to purchase the property after it was sold to Westport Capital and Stonewall, but BWRR’s offer was rejected.

On June 8, 2021, BWRR filed a Complaint for Condemnation and Demand for Jury trial against Stonewall. Stonewall moved to dismiss on July 1, 2021, and BWRR filed its Amended Complaint on July 6, 2021. Stonewall moved to dismiss the Amended Complaint on July 12, 2021. BWRR filed an opposition to the motion on July 23, 2021, Stonewall filed a reply on August 16, 2021, and BWRR filed a surreply on August 26, 2021.

BWRR explains that it needs the Property to construct and operate its railroad and that the Property is necessary regardless of which of two proposed alignments for the SCMAGLEV is selected. BWRR posits that the Property is necessary for the Baltimore City SCMAGLEV Station, a maintenance area and maintenance tail track, a parking area, and construction areas. BWRR presents numerous economic, social, and environmental benefits of its proposed SCMAGLEV system.

The circuit court held a hearing on August 30, 2021, and granted Stonewall’s motion to dismiss at the conclusion of the hearing. The circuit court discussed several potential grounds for dismissal in its ruling but only issued a specific ruling on one basis, namely, whether BWRR had obtained consent from Baltimore City as required by statute. The court also discussed the limited scope of the Public Service Commission’s order, a four-year statute of limitations applicable to instrumentalities of the state in condemnation actions, and discussed whether the SCMAGLEV is properly considered a railroad.

The circuit court referenced Md. Code (1974, 2015 Repl. Vol.), § 12-105.1 of the Real Property Article (“RP”), which sets forth a four-year statute of limitations for condemnation actions brought by “the State or any of its instrumentalities or political subdivisions.” The court observed that “the argument can be made about the four year statute of limitations” but considered it to be “a bit of a catch 22, because [the limitations period runs] four years after the authorization to acquire the property. And there was no authorization to acquire the property . . . in the Public Service Commission’s order.” The court did not issue a ruling as to the applicability of RP § 12-105.1 or as to whether the action was barred due to the four-year time period having expired.

The circuit court then turned to the issue it found dispositive on the motion to dismiss, explaining that the court found “there [wa]s not consent from the Mayor and City Council” as required by Md. Code (1998, 2020 Repl. Vol.), § 5-407 of the Public Utilities Article (“PU”). The court further opined that “[i]t can not be said that [PU § 9-303] contemplated a mag[lev]” and “I think it’s arguable that a mag[lev]’s not a railroad.” The

court explained that “it may be arguable that the construction of a mag[lev] may not even fit into 9-303” and observed that “[p]laintiffs could argue, well, that’s something that we could prove if this case went forward. But there’s no way around 5-407 [of the Public Utilities Article].”

This appeal followed.

DISCUSSION

I. Standard of Review

Our review of the circuit court’s grant of a motion to dismiss is *de novo*. *D.L. v. Sheppard Pratt Health Sys., Inc.*, 465 Md. 339, 350 (2019). “When reviewing the grant of a motion to dismiss, the appropriate standard of review ‘is whether the trial court was legally correct.’” *Id.* (quoting *Blackstone v. Sharma*, 461 Md. 87, 110 (2018)). “We will affirm the circuit court’s judgment ‘on any ground adequately shown by the record, even one upon which the circuit court has not relied or one that the parties have not raised.’” *Advance Telecom Process LLC v. DSFederal, Inc.*, 224 Md. App. 164, 174 (2015) (quoting *Monarc Constr., Inc. v. Aris Corp.*, 188 Md. App. 377, 385 (2009)). When reviewing a motion to dismiss, appellate courts “accept all well-pled facts in the complaint, and reasonable inferences drawn from them, in a light most favorable to the non-moving party because the object of a motion to dismiss is to argue that relief could not be granted on the facts alleged as a matter of law.” *Sprenger v. Pub. Serv. Comm’n of Md.*, 400 Md. 1, 21 (2007) (cleaned up).

II. The circuit court erred in determining that BWRR had failed to obtain Baltimore City’s consent.

The first issue before us in this appeal is the issue upon which the circuit court granted Stonewall’s motion to dismiss: namely, Baltimore City’s alleged lack of consent to the transfer of the franchise. The circuit court granted the motion on the grounds that “there [wa]s not consent from the Mayor and City Council” of Baltimore City as required by Md. Code (1998, 2020 Repl. Vol.), § 5-407 of the Public Utilities Article (“PU”). The circuit court found that

no [c]ourt could find that all that needs to be complied with in order to make a finding that the BWRR has the authority to proceed in its’ condemnation can’t be complied with, because the consent is required. It’s a statutory requirement and it’s not been met . . . there’s no way around [PU §] 5-407.

BWRR asserts that the circuit court’s determination that BWRR had not received the requisite consent was in error. We agree.

Pursuant to PU § 5-407(d), “[a] railroad company may not pass through Baltimore City without the consent of the Mayor and City Council.” When the Public Service Commission issued its order granting BWRR’s request to transfer the WBA franchise, the Public Service Commission recognized this statutory requirement and specifically required that BWRR seek the consent of the Mayor and City Council of Baltimore. Specifically, the Commission’s order discussed the consent requirement as follows in Attachment A of its decision:

Notwithstanding Federal law regarding jurisdiction over the construction of railroads, the Commission’s grant of authority to exercise the franchise formerly held by the Washington,

Baltimore, and Annapolis Railroad is contingent upon the written agreement of Baltimore Washington Rapid Rail, LLC (“BWRR”) to seek the consent of the Mayor and City Council of Baltimore City, as specified in the franchise as granted by the Maryland General Assembly, and consistent with Maryland Public Utilities Article . . . §§ 5-407 and 9-303(d).

After the Commission issued its order, BWRR sought and obtained the consent of the Mayor and City Council as required by statute. On March 17, 2017, Baltimore City enacted Resolution 17-01, which contained the following express consent:

SECTION 1. BE IT RESOLVED BY THE MAYOR AND CITY COUNCIL OF BALTIMORE, That the Mayor and City Council of Baltimore acknowledge that **BWRR has sought its consent to the transfer of the authority to exercise the franchise formerly held by the Washington, Baltimore and Annapolis Railroad in accordance with PSC Order No. 87248, in Case 9363, and the Mayor and City Council of Baltimore hereby grant that consent, subject to Section 2 of this ordinance regarding the necessity of a franchise ordinance to construct and operate the SCMAGLEV on City Public ways.**

SECTION 2. AND BE IT FURTHER RESOLVED, That Section 1 of this Mayor and City Council resolution does not constitute consent or authorization for BWRR to occupy any road, street, alley, or other public way in Baltimore City, and in the event BWRR intends to occupy any road, street, alley, or other public way in Baltimore City, additional prior consent in accordance with Article 8 of the Baltimore City Charter must be obtained from the Mayor and City Council of Baltimore.

(Underline in original, bold text added.)

This was the consent required by PU § 5-407(d) to allow a railroad to “pass through Baltimore City.” Stonewall acknowledges that BWRR sought and obtained this consent but nonetheless contends that BWRR failed to obtain required consent because it did not seek and/or obtain authorization to cross any Baltimore City road, street, alley, or public

way. Pursuant to PU § 9-303(d), a Maryland railroad company is not permitted “to condemn, use, or occupy any part of a highway, including the space under or over a highway, without the consent of the proper authorities of the municipal corporation or county where the highway is located.” The Mayor and City Council specifically provided in Section 2 of its resolution that BWRR would be required to obtain “additional prior consent in accordance with Article 8 of the Baltimore City Charter” if it intended “to occupy any road, street, alley, or other public way.” This case, however, does not involve any Baltimore City roads, streets, alleys, or public ways.

BWRR asserts that if and when it obtains federal approval for the SCMAGLEV route, and that route requires occupying public ways in Baltimore City, BWRR will seek Baltimore City’s consent at that time. Until then, BWRR maintains that such consent is not required to bring this condemnation action, and we agree. BWRR sought and obtained the consent required by PU § 5-407(d). No further consent is necessary at this time.

Despite the fact that the condemnation action filed in this case involves only privately owned property, Stonewall contends that Section 2 of the Baltimore City Ordinance is implicated because the Property is located within Baltimore City and BWRR cannot access it without crossing any Baltimore City streets or roadways. This case, however, is not about accessing property via Baltimore City public ways. This case is only about whether BWRR has the authority to seek to acquire via condemnation a privately owned parcel of land. BWRR sought and obtained the only consent required at this time.

We hold, therefore, that the circuit court erred by concluding that BWRR had failed to obtain consent as required by PU § 5-407(d) as a matter of law.

III. None of the other grounds raised in the trial court justify dismissal.

The only clear basis for the circuit court’s ruling was BWRR’s purported failure to obtain consent from Baltimore City. Nonetheless, the circuit court made references to other potential grounds for dismissal. The circuit court somewhat equivocally referred to the limited scope of the Public Service Commission’s order, observing that “the argument can be made about the four year statute of limitations” applicable to instrumentalities of the state in condemnation actions. The circuit court further opined that “it’s arguable that a mag[lev]’s not a railroad,” observing that “[p]laintiffs could argue, well, that’s something that we could prove if this case went forward.” At the conclusion of the hearing, the circuit court stated, “for all of the reasons stated, the [m]otion to [d]ismiss is granted.” Given the equivocal nature of the circuit court’s comments on the other issues, we agree with BWRR that a fair reading of the transcript of the circuit court’s ruling reveals that PU § 5-407(d) was the sole basis for dismissal, particularly given that the circuit court concluded by stating that “there’s no way around [PU § 5-407].”³

³ Stonewall presents the basis of the circuit court’s ruling more broadly, arguing that the circuit court found that the Public Service Commission’s order does not authorize this specific condemnation. In connection with this characterization of the circuit court’s ruling, Stonewall argues *inter alia* that the transfer of the railroad franchise did not include the right to exercise the franchise, that the four-year statute of limitations bars BWRR’s condemnation claim, and that the SCMAGLEV is not a railroad.

BWRR urges us to address all of these issues even though the circuit court’s determination hinged only on the consent issue. BWRR contends that each issue was raised below, either by the parties or by the circuit court, and each issue remains hotly disputed. BWRR further asserts that this Court should exercise its discretion pursuant to Md. Rule 8-131(a) to decide these issues “if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.” Because it is in the interest of judicial economy, we shall address these issues to the extent appropriate absent discovery and given the procedural posture of this appeal. We are mindful that the parties will have the opportunity to fully develop the record on remand, however, and we do not seek to undertake an assessment of contested facts or other matters more appropriately within the scope of the trial court.

- A. *The Public Service Commission’s Order granting BWRR’s application to transfer the WBA Railroad Franchise included the right to exercise the franchise.*

BWRR asserts that the BWRR “unquestionably possesses condemnation rights as a matter of law,” while Stonewall contends that the Public Service Commission’s order did not include a transfer of any authority to exercise the franchise. As we shall explain, the Public Service Commission’s order includes an authorization for BWRR to exercise the railroad franchise previously granted to WBA.

In connection with its argument that the Public Service Commission’s order did not include a transfer of condemnation authority, Stonewall focuses upon language under the heading of “Authority to Transfer the WBA Franchise.” The Commission considered that

WBA had “long ceased railroad operations associated with its authority to exercise the franchise” and agreed with the position advanced by Commission Staff “that ‘[BWRR] cannot reasonably claim that the consent given by Baltimore City more than a century ago, for the construction of a very different type of railroad, on a completely different right-of-way, can apply to its proposed SCMAGLEV now.’” The Commission continued:

Thus, a transfer of the WBA Franchise can only be of the “nascent” franchise and the authority to exercise the franchise that WBA may have been granted and any action that WBA took or agreements/consents obtained do not convey as part of an approval to the transfer of the Franchise.

Accordingly, I find that the Commission has authority to transfer the WBA Franchise to BWRR under the Publ. Util. Art. § 5-103(b)(1), but approval of the transfer of the WBA Franchise does not transfer any authority to exercise the WBA Franchise nor does it convey any agreements, consents or other tangible or intangible rights acquired by WBA through its exercise of the Franchise. The extent to which BWRR may exercise the authority is a separate action by the Commission, and the Commission may determine what rights under the WBA Franchise BWRR may exercise as well as any corresponding obligations BWRR must comply with under the Franchise to enjoy the privileges granted to by it.

Stonewall asserts that this language establishes that BWRR may not take any steps to exercise the franchise without first instituting a separate action before the Commission “to determine whether BWRR can actually exercise the authority that may arise pursuant to the franchise.” BWRR responds that Stonewall has taken this language out of context and that the Commission’s approval of the transfer of the WBA franchise to BWRR included the right to exercise it. We agree with BWRR.

After setting forth its conclusion as to whether it had the authority to transfer the franchise, the Commission observed that it “must find that the transfer and subsequent authority to exercise the Franchise is in the public convenience and necessity.” After discussing at length the arguments presented in support of the transfer, as well as certain conditions proposed by the Commission’s Staff, the Commission unequivocally articulated its conclusion as follows:

The evidence in the record is sufficient to find that the transfer of the WBA Franchise to facilitate the development and assist in acquiring the federal approvals necessary to build the DC-Baltimore segment of the SCMAGLEV is in the public convenience and necessity, subject to the conditions set forth in Attachment A attached hereto and incorporated hereby. I also find, subject to the conditions in Attachment A, grant of the authority to exercise the WBA Franchise, as limited to the WBA Main Line route, is in the public convenience and necessity.^[4]

Attachment A specifically referred to the exercise of eminent domain in Paragraph 3:

Authorizing the transfer of the right to exercise the franchise does not convey the right of eminent domain broader than defined in [PU] §§ 1-101(y) and 9-303. Within the limits described by these provisions, property obtained in accordance with their requirements may also accommodate collateral uses, including by way of illustration but not limitation, construction in the air rights above a railroad station or combining parking with maintenance facilities, etc., if otherwise allowed by law.

We agree with BWRR that the Commission’s order, which includes language expressly granting the right to exercise the franchise including the right of eminent domain, not only

⁴ The “WBA Main Line route” is the “route from the eastern boundary of Maryland and the District of Columbia to Baltimore City and passing through the counties of Prince George’s, Anne Arundel, and Baltimore and Baltimore City.”

authorized the transfer of the franchise but also established BWRR’s right to exercise the franchise.⁵

B. Whether the SCMAGLEV is a “Railroad.”

Stonewall argued before the circuit court and before this Court that the SCMAGLEV is not a railroad as a matter of law. BWRR contends that the SCMAGLEV is a railroad as a matter of law. The circuit court did not issue a ruling on this matter, but the court did comment that “it’s arguable” that the SCMAGLEV is “not a railroad.” Based upon the limited record before us in this appeal, we shall not determine conclusively whether the SCMAGLEV is a railroad as a matter of law. We observe, however, that the Public Service Commission, as well as the applicable federal agencies, appear satisfied that the SCMAGLEV is, in fact, a railroad for all relevant purposes.

Stonewall asserts that the SCMAGLEV, a “‘super-conducting levitation train’ that can travel at speeds up to 300 miles per hour” cannot satisfy the definition of railroad set forth in PU § 1-101(aa)(1), which defines a railroad as “a common carrier by rail powered in any manner.” Stonewall asserts that the SCMAGLEV “does not actually operate on any rail system whatsoever,” and, accordingly, does not satisfy the statutory definition of “railroad.”

⁵ This reading is consistent with other requirements set forth by the Commission, including, *inter alia*, the requirement that BWRR “notify the Commission, in writing 30 days after construction has begun,” as well as the requirement that BWRR “brief the Commission every five years regarding construction and operation of the SCMAGLEV.”

BWRR emphasizes that the Public Service Commission described the SCMAGLEV as a “train” that will operate on a “railway,” and would be regulated by the Federal Railroad Administration and the Surface Transportation Board. Perhaps most importantly, the Public Service Commission granted BWRR’s application to transfer and exercise the WBA railroad franchise. In its complaint, BWRR specifically alleged that: BWRR is a Maryland-based railroad company; the SCMAGLEV is a train that runs in a concrete guideway containing coils for guidance and propulsion of the train, which are powered by electricity; and that the Commission granted to BWRR a legislatively-created railroad franchise for the purpose of developing the SCMAGLEV project. In the context of a motion to dismiss, these facts must be presumed to be true. We decline to reach the conclusion advanced by Stonewall that the SCMAGLEV is not a railroad as a matter of law.

C. Whether the Four-Year Statute of Limitations Set Forth in RP § 12-105.1 Bars BWRR’s Condemnation Action.

When issuing its ruling, the circuit court referred to the four-year limitation period for condemnation actions brought by “the State or any of its instrumentalities or political subdivisions” set forth in RP § 12-105.1. The circuit court observed that “the argument can be made about the four year statute of limitations,” but the circuit court did not issue an express ruling on this issue. The court explained that this issue was “a bit of a catch 22, because it’s four years after the authorization to acquire the property. And there was no authorization to acquire the property . . . in the Public Service Commission’s order.”

Section 12-105.1 of the Real Property Article sets forth the following limitations period for condemnation actions:

(a) Notwithstanding any other provision of law, the State or any of its instrumentalities or political subdivisions shall file an action to acquire private property for public use by condemnation within 4 years of the date of the specific administrative or legislative authorization to acquire the property.

(b) If an action for condemnation is not filed within 4 years of the date described in subsection (a) of this section, the State or any of its instrumentalities or political subdivisions may not proceed with condemnation until it first obtains a new authorization to acquire the property.

BWRR asserts that because RP § 12-105.1 expressly applies only to “the State or any of its instrumentalities or political subdivisions,” it is inapplicable to BWRR. Stonewall asserts that BWRR is an instrumentality of the State, as would be any entity exercising the power of eminent domain “[b]ecause the power of eminent domain is uniquely derived from the sovereignty of the State.”

First, we observe that BWRR alleged in its complaint that it was a private limited liability company and, specifically, “not an instrumentality of the State of Maryland.” The circuit court was required to accept these facts and any inferences drawn from them as true in light of the motion to dismiss posture of the case.

We have explained that, even in the context of statutorily-established entities (unlike BWRR, which is a private company), “the Court of Appeals has repeatedly recognized that there is no single test for determining whether a statutorily-established entity is an agency or instrumentality of the State for a particular purpose.” *Daughton v. Maryland Auto. Ins.*

Fund, 198 Md. App. 524, 538 (2011). BWRR invites this Court to determine what test the circuit court should apply on remand for determining whether an entity is an “instrumentality” for condemnation purposes. We decline to make such a determination on a hypothetical basis without the benefit of discovery and when this issue has not been addressed or decided by the circuit court.

We note, however, that Stonewall’s assertion that *any* entity that exercises powers of eminent domain other than the State necessarily must be considered an instrumentality of the State appears to be without basis. The General Assembly has specifically used the term “condemning authority” in certain instances, suggesting a broader category of those entities with authority to exercise powers of eminent domain. Furthermore, as BWRR observes, although the State and its instrumentalities may require “specific administrative or legislative authorization to condemn” pursuant to RP 12-105.1, other entities, including telephone and gas companies, do not. *See, e.g.*, PU § 5-403(b) (governing condemnation by domestic or foreign gas companies); PU § 5-410(b) (governing condemnation by telephone companies and providing that a telephone company may acquire by condemnation “any property or right that the company considers necessary for its purposes”). Similarly, PU § 9-303(b) provides that a railroad company “may acquire land and other property that it determines is convenient or necessary for the site of the railroad or for additions to the railroad” by condemnation). These are matters that the circuit court may consider on remand.

**JUDGMENT OF THE CIRCUIT COURT
FOR BALTIMORE CITY REVERSED.
ORDER GRANTING MOTION TO
DISMISS VACATED. CASE REMANDED
FOR FURTHER PROCEEDINGS
CONSISTENT WITH THIS OPINION.
COSTS TO BE PAID BY APPELLEE.**